IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2008 Session

KATHY HUBER, ET AL. v. DOUGLAS MARLOW, ET AL.

Interlocutory Appeal from the Circuit Court for Knox County
No. 1-346-04 Dale C. Workman, Judge

No. E2007-01879-COA-R9-CV - FILED MAY 28, 2008

In this interlocutory appeal of a medical malpractice case, the issue presented is whether the trial court erred in granting partial summary judgment to the employer because it could not be held vicariously liable for the actions of its nonparty employee when the statute of repose had run as to the nonparty employee before the plaintiffs amended their complaint to include allegations based on the nonparty employee's actions. We hold that because the statute of repose extinguished the plaintiffs' cause of action against the nonparty employee, the employer cannot be held liable for allegations of medical negligence based solely on the actions of the nonparty employee. The trial court's partial summary judgment is affirmed.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Affirmed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. KELLY THOMAS, JR., SP. J., joined.

Joe Costner, Maryville, Tennessee, for the Appellants, Kathy Huber, individually and on behalf of Elizabeth Chenoweth as her surviving child and next of kin, and Barbara Pendergrass, individually and on behalf of Elizabeth Chenoweth as her surviving child and next of kin.

Wynne C. Hall, John W. Elder, and Daniel C. Headrick, Knoxville, Tennessee, for the Appellee, Internists of Knoxville, PLLC.

OPINION

I. Background

Elizabeth Chenoweth was admitted to Baptist Hospital of East Tennessee at the direction of her primary physician, Dr. Douglas Marlow, on June 4, 2003. At the time of her admission, Ms. Chenoweth was suffering from confusion and dehydration. Dr. Marlow examined and treated Ms. Chenoweth from June 4-6, 2003. On the evening of June 6, 2003, Dr. Marlow went off duty and transferred care of Ms. Chenoweth to Dr. David Rankin.

In the early morning of June 7, 2003, Ms. Chenoweth got out of her hospital bed and fell, sustaining a head injury. Dr. Rankin was advised of the fall and injury, and also that Ms. Chenoweth was taking heparin, an anticoagulant medicine. Dr. Rankin ordered a CT scan,[1] which revealed no intracranial bleeding, although the report from the scan noted "what is probably [a] linear artifact seen in the left frontal lobe." Approximately eight hours after Ms. Chenoweth's fall, Dr. Rankin was advised that her neurological status had changed, and he ordered another CT scan and discontinued the administration of heparin. The second CT scan revealed an intracranial hemorrhage. Ms. Chenoweth underwent surgery to relieve the pressure caused by the hemorrhage on June 8, 2003, and died two days later. The death certificate listed as her immediate cause of death the intracranial hemorrhage.

On June 7, 2004, Kathy Huber and Barbara Pendergrass, Ms. Chenoweth's daughters, filed this action against Baptist Hospital of East Tennessee, Inc., Dr. Marlow, and Internists of Knoxville, PLLC, which was the employer of both Dr. Marlow and Dr. Rankin. The Plaintiffs later reached a settlement agreement with Baptist Hospital, and the hospital was dismissed from the case. On September 18, 2006, the Plaintiffs amended their complaint to include, among other things, the following allegations of improper administration of heparin:

> That Internists of Knoxville and Dr. Marlow failed to promptly stop the administration of heparin and the failure to take prompt measures to reverse the anti-coagulating effects of heparin for over seven hours after her fall and obvious head injury, substantially contributed to the progression and development of a multifocal hematoma in the left frontal lobe of the brain. That had the administration of heparin been promptly discontinued with the implementation of medication to reverse its effects, Elizabeth Chenoweth would not have died from her fall.

Internists of Knoxville and Dr. Marlow moved for partial summary judgment on the issue of whether they could be held liable for the allegedly negligent failure to timely discontinue the administration of heparin to Ms. Chenoweth. Dr. Marlow argued that he was off duty and had no responsibility for Ms. Chenoweth's care at the time of her fall, the subsequent intracranial hemorrhage and surgery, and the decision to take her off heparin. Internists of Knoxville argued that it could not be held vicariously liable under the *respondeat superior* doctrine for negligent acts and omissions of Dr. Rankin when Dr. Rankin had never been sued and the three-year statute of repose had run as against Dr. Rankin prior to the filing of Plaintiffs' amended complaint.

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[1] Computed tomography (CT) is an imaging method that uses x-rays to create cross-sectional pictures of the body.

The parties agreed that the following facts were undisputed for purposes of the motion for partial summary judgment:

> Dr. Marlow transferred care of decedent, Elizabeth M. Chenoweth, on the evening of June 6, 2003 to Dr. David Rankin pursuant to a call coverage agreement.
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> Dr. Marlow did not examine [Ms. Chenoweth] between her alleged fall in the early morning hours of June 7, 2003 and the time Heparin administration was discontinued later that same day.
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> Dr. Marlow did not examine [Ms. Chenoweth] after she had allegedly fallen until June 9, 2003.
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> Dr. David Rankin was the physician on call who was contacted on June 7, 2003 regarding [Ms. Chenoweth's] alleged fall.

The Plaintiffs did not oppose Dr. Marlow's motion for partial summary judgment; it was granted and has not been appealed. As to Internists of Knoxville, the Plaintiffs argued that the amendments to their complaint were proper and timely under the "relation back" doctrine provided by Tenn. R. Civ. P. 15.03. The trial court ruled that as a matter of law, Internists of Knoxville was entitled to summary judgment on the allegations of Plaintiffs' amended complaint regarding the discontinuance of heparin because the three-year statute of repose found at Tenn. Code Ann. § 29-26-116(a)(3) had extinguished the Plaintiffs' malpractice cause of action against the agent/employee Dr. Rankin. The trial court and this court granted Plaintiffs permission to take an interlocutory appeal pursuant to Tenn. R. App. P. 9.

II. Issue Presented

The issue presented in this interlocutory appeal is whether the trial court erred in granting Internists of Knoxville partial summary judgment on the grounds that it could not be held vicariously liable under the *respondeat superior* doctrine for Dr. Rankin's actions when the three-year statute of repose had run as against Dr. Rankin before the plaintiffs amended their complaint to include allegations based on Dr. Rankin's alleged negligence.

III. Analysis

A. Standard of Review

Our standard of review of a summary judgment was recently restated by the Tennessee Supreme Court as follows:

> Summary judgment is to be granted by a trial court only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.03; ***Byrd v. Hall,*** 847 S.W.2d 208, 210 (Tenn. 1993). The party seeking summary judgment bears the burden of demonstrating that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. ***Godfrey v. Ruiz,*** 90 S.W.3d 692, 695 (Tenn. 2002). In reviewing the record to determine whether summary judgment requirements have been met, we must view all the evidence in the light most favorable to the non-moving party. ***Eyring v. Fort Sanders Parkwest Med. Ctr., Inc.***, 991 S.W.2d 230, 236 (Tenn. 1999); ***Byrd,*** 847 S.W.2d at 210-11. We review a trial court's grant of summary judgment de novo, according no presumption of correctness to the trial court's determination. ***Blair v. W. Town Mall,*** 130 S.W.3d 761, 763 (Tenn. 2004); ***Godfrey,*** 90 S.W.3d at 695.

Boren v. Weeks, — S.W.3d —, No. M2007-00628-SC-R11-CV, 2008 WL 1945985, at *4 (Tenn. May 6, 2008). In the present case, all facts material to this appeal are undisputed, and the issue presented is solely one of law.

B. Vicarious Liability of Employer for Nonparty Employee Protected by Statute of Repose

In this action, the sole theory or source of liability for Internists of Knoxville is the *respondeat superior* doctrine, which, generally speaking, "permits the master/principal to be held liable for the negligent acts of his servant/agent." ***Johnson v. LeBonheur Children's Med. Ctr.***, 74 S.W.3d 338, 343 (Tenn. 2002). In ***Johnson,*** the Supreme Court was presented with the question of whether a physician resident's personal immunity from a lawsuit prohibited the hospital where the resident worked from being held vicariously liable under the *respondeat superior* doctrine based upon the resident's actions. The Court answered in the negative and further stated as follows:

> [*A*] *principal may not be held vicariously liable under the doctrine of respondeat superior based upon the acts of its agent in three instances*: (1) when the agent has been exonerated by an adjudication of non-liability, (2) *when the right of action against the agent is extinguished by operation of law*, or (3) when the injured party extinguishes the agent's liability by conferring an affirmative, substantive right upon the agent that precludes assessment of liability against the agent.

Johnson, 74 S.W.3d at 345 (emphasis added). The Supreme Court reiterated this principle a year later in ***Shelburne v. Frontier Health***, 126 S.W.3d 838, 844 (Tenn. 2003). *See also* **Grigsby v. Univ. of Tenn. Med. Ctr.**, No. E2005-01099-COA-R3-CV, 2006 WL 408053, at *5 (Tenn. Ct. App. E.S., filed Feb. 22, 2006).

Internists of Knoxville argues that the second circumstance listed by ***Johnson*** and ***Shelburne*** is present here, *i.e.*, that the right of action against the agent, Dr. Rankin, was "extinguished by operation of law" when the statute of repose for a medical malpractice action ran. We agree. The applicable three-year statute of repose, found at Tenn. Code Ann. § 29-26-116(a)(3), provides as follows:

> In no event shall any such [malpractice] action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

Tenn. Code Ann. § 29-26-116(a)(3). Our Supreme Court has recently described the effect and operation of a statute of repose as follows:

> [S]tatutes of repose are substantive rather than procedural. "Statutes of repose are substantive and *extinguish both the right and the remedy* while statutes of limitations are procedural, extinguishing only the remedy." *Id.* [citing ***Jones v. Methodist Healthcare,*** 83 S.W.3d 739 (Tenn. Ct. App. 2001)] Thus, a statute of repose typically
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> > does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising . . . . The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria* – a wrong for which the law allows no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy.
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> ***Rosenberg v. Town of North Bergen,*** 293 A.2d 662, 667 (1972) (emphasis in original). A statute of repose, however, does not always extinguish the cause of action before it accrues: "'Where the injury occurs within the [repose] period, and a claimant commences his . . . action after the [repose] period has passed, an action accrues but is barred. Where the injury occurs outside the [repose] period, no substantive cause of action ever accrues, and a claimant's actions are likewise barred.'" ***Penley,*** 31 S.W.3d [181] at 184 [Tenn. 2000]

> (quoting ***Gillam v. Firestone Tire & Rubber Co.,*** 241 Neb. 414, 489 N.W.2d 289, 291 (1992)). In short, "[s]tatutes of repose operate differently [from] . . . statutes of limitation[s]" because statutes of repose impose "an *absolute time limit* within which action must be brought." ***Penley,*** 31 S.W.3d at 184 (emphasis added).
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> As we have stated above, the medical malpractice statute of repose imposes an absolute three-year bar on such actions, with the exception of the exemptions in the statute itself.

Calaway v. Schucker, 193 S.W.3d 509, 515 (Tenn. 2005) (emphasis added).

Moreover, the Supreme Court has repeatedly described the fate of a medical malpractice right of action once the three-year repose period has passed as being "extinguished." ***Id.*** at 515; ***Mills v. Wong***, 155 S.W.3d 916, 925 (Tenn. 2005) (stating "[j]ust as the medical malpractice statute of repose validly extinguishes undiscovered causes of action which have yet to accrue, it also validly extinguishes even accrued and vested rights of action."); ***Penley v. Honda Motor Co.***, 31 S.W.3d 181, 184 (Tenn. 2000); ***Cronin v. Howe***, 906 S.W.2d 910, 913 (Tenn. 1995).

In this case, Ms. Chenoweth was admitted to the hospital on June 4, 2003, and died on June 10, 2003. The statute of repose for claims based on medical malpractice ran no later than June 10, 2006. The Plaintiffs did not amend their complaint to include the allegations regarding the failure to timely discontinue heparin until September 18, 2006. The original complaint made no allegations, general or otherwise, against Dr. Rankin or any other employee of Internists of Knoxville besides Dr. Marlow. Significantly, the undisputed facts here make it clear that Dr. Rankin was the physician responsible for Ms. Chenoweth's care during the time of her fall and during the relevant time period thereafter, and it was Dr. Rankin who ordered the discontinuance of heparin. Although the Plaintiffs have not sued Dr. Rankin and the statute of repose has extinguished their cause of action against Dr. Rankin, they have sought to hold his employer, Internists of Knoxville, vicariously liable for his actions, through an action initiated more than three years after the alleged malpractice and injury. Under the statute of repose, Tenn. Code Ann. § 29-26-116(a)(3), and the ***Johnson*** and ***Shelbourne*** decisions as discussed above, the trial court was correct in finding this impermissible and granting Internists of Knoxville partial summary judgment.

The Plaintiffs argue, however, that the "relation back" doctrine found in Tenn. R. Civ. P. 15.03 operates to save their cause of action against Internists of Knoxville for Dr. Rankin's actions under the *respondeat superior* doctrine. We disagree. Tennessee Rule of Civil Procedure 15.03 provides as follows:

> Whenever the claim or defense asserted in amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to

> the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The Plaintiffs further rely on the cases of ***Karash v. Pigott***, 530 S.W.2d 775 (Tenn. 1975) and ***Hawk v. Chattanooga Orthopaedic Group, P.C.***, 45 S.W.3d 24 (Tenn. Ct. App. 2000) for support of their position. While these cases arguably support the proposition that the relation back doctrine would allow Plaintiffs to amend their complaint to include further allegations against Dr. Marlow (who was timely sued) and/or Internists of Knoxville *in its capacity as Dr. Marlow's employer*, they cannot be used to support an "end run" around the statute of repose as against Dr. Rankin or Internists of Knoxville in its capacity as Dr. Rankin's employer.

In the ***Hawk*** decision, this court held that under the facts presented, "since the original complaint was filed within one year of surgery and since the amendments relate back to that date, the amendments are not barred by the statute of limitations and obviously not by the statute of repose." ***Hawk***, 45 S.W.3d at 33. But the ***Hawk*** opinion was careful to state that in that case, no new defendant was being added after the running of the statutes of limitations and repose. ***Id.*** at 30, 31, 33. In the present case, although Plaintiffs did not add Dr. Rankin as a defendant, they have, for all practical purposes and effect, tried to add a new party defendant more than three years after the alleged negligence and injury – Internists of Knoxville, *in its capacity as Dr. Rankin's employer* – based solely upon the actions of Dr. Rankin, a nonparty employee against whom the Plaintiffs' cause of action has been extinguished by the statute of repose. The relation back doctrine of Tenn. R. Civ. P. 15.03 does not contemplate nor permit such a result.

IV. Conclusion

For the aforementioned reasons, the trial court's partial summary judgment in favor of Internists of Knoxville, PLLC, is affirmed. Costs on appeal are assessed to the Appellants, Kathy Huber, individually and on behalf of Elizabeth Chenoweth as her surviving child and next of kin, and Barbara Pendergrass, individually and on behalf of Elizabeth Chenoweth as her surviving child and next of kin.

SHARON G. LEE, JUDGE